IN RE LORRAIN ESME OSMAN

HIGH COURT, LONDON
MANN LJ
GARLAND J
[CO/252/90]
12 DECEMBER 1990

STATUTORY INTERPRETATION: *Committal order - Extradition - Repealed statute - Whether committal order valid - Extradition Act 1989 [UK], ss. 9, 11, 37(1) - Interpretation Act 1978 [UK], s. 17(2).*

CIVIL PROCEDURE: *Application for writ of habeas corpus ad subjiciendum - Custody - Awaiting extradition - Abuse of process - Jurisdiction of Court to refuse committal process - Magistrate - Prior habeas corpus applications dismissed - Missing documents - Lapse of time - Delay in initiating process - Motive of the accuser - Publicity - Personal circumstances of accused.*

The applicant L was committed to custody by an order under s. 7(5) of the Fugitive Offenders Act 1967 (FOA) in relation the infamous BMF scandal and is awaiting extradition to Hong Kong. L's previous applications to secure his release of custody *vide habeas corpus* applications (HC1, HC2, HC3) were dismissed and his petitions for leave to appeal were also dismissed. This is his 4th application for a writ of *habeas corpus ad subjiciendum*.

During the course of proceedings in HC3, at the request of the Court, 9 documents were produced. L's motion for discovery of further documents was dismissed in June 1990 (reported in [1990] 2 CLJ 529) and in November the Court allowed the motion of the Foreign and Commonwealth Office that these 9 documents were subject to public interest immunity and that there was nothing in these documents to show that the Hong Kong Government had any other motive in proceeding against L other than his prosecution for crimes alleged to have been committed by him for which the Courts of Hong Kong admittedly have jurisdiction to try him.

In this application, L's Counsel argues that the new s. 11 of the Extradition Act 1989 (the 1989 Act), which repealed the FOA and re-enacted it with certain modifications, is inapplicable to L because he was committed not "under s. 9 above" as provided for in s. 11 of the 1989 Act but under s. 7 of the FOA. (L's application for *habeas corpus* was based on the grounds of elapse of time, the absence of certain documents, the motive of the accuser, the likely absence of some witnesses from a trial in Hong Kong, publicity and the personal circumstances of L.

L's Counsel also contended that the Court had an inherent jurisdiction to refuse a committal on the basis of abuse of process.

Counsel for one of the respondents, the Government of Hong Kong, contends that this 4th application for *habeas corpus* is both an abuse of process and a contravention of s. 14(2) of the Administration of Justice Act 1960 (the 1960 Act) as some of the grounds relied on by L were available to L at the time of HC1, HC2 and HC3 but which were then not taken by him.

Held:

[1] Under s. 17(2) of the Interpretation Act 1978, s. 7 of the FOA is re-enacted with modifications by s. 9 of the 1989 Act and accordingly the committal of 1 June 1987 now has effect as "a thing done" under s. 9 of the 1989 Act.

[2](a)A Magistrate who holds extradition committal proceedings is invested with an inherent jurisdiction to prevent an abuse of the process of extradition committal.

(b) if the Magistrate has an inherent jurisdiction to prevent abuse of the extradition committal process, so does this Court on an application for prohibition, should the Magistrate either not admit the jurisdiction or decline to exercise it;

(c) if he admitted the jurisdiction, his exercise of it could be challenged by *certiorari* or where committal has occurred on an application for *habeas corpus*.

[3] There is no evidence whatever that the Government of Hong Kong had any motive other than that of bringing to justice a person whom it alleges committed offences within its jurisdiction.

[4] Assuming that the first occasion on which L resisted extradition was the hearing which commenced on 12 November 1990, the length of time was long but the passage of time has not been due to any dilatoriness on the part of the government who cannot properly be held blameworthy in the matter of the passage of time since the commission of the offences. The evidence showed that the Government of Hong Kong at all times proceeded with promptitude.

[5] Although age and settlement can be factors taken into account, there is no hardship or oppression in returning a man whose age has increased to 59 during the elapse of time or whose settlement during the lapse of time endured between the unknown date in 1984 and his arrest on 6 December 1985. The circumstances that L is a Malay and the place of trial would be Hong Kong are not circumstances arising during the elapse of time.

[6] None of the publicity which has occurred is specifically adverse to L and any possibility of prejudice could be dispersed by the trial Judge.

[7] The location of witnesses in Malaysia or Hong Kong, even if it is regarded as a circumstance occurring within or related to the elapse of time, it is not a circumstance which would make it unjust to return L. The fact that there are witnesses and documents in different jurisdictions are common-place in international fraud trials and there are protective provisions as to the admission of depositions taken abroad.

[8] The circumstance or event of document having become "missing" does not persuade the Court that it would be unjust to return L; it is a matter of speculation whether these documents may be relevant to L's defence and it is not known if the absence of the documents would be a significant detraction. The Court was also not prepared to assume that Bank Bumiputra Malaysia Bhd. will not trace the documents as there was a pending order in a Malaysian Court for the discovery of these documents.

[9] The Court could not accept L's contention that the passage of time, regardless of events occurring during the passage is enough as it is events within the elapsed time which are to be considered; there was no delay by the government as the only process which was initiated by the government was the extradition process and there was no interval before (or indeed after) initiation which could be stigmatised as "delay" by the government in the necessarily

complex circumstances of the case. There is not here anything which would suggest the risk of "a flagrant denial" such as the European Court Humans Rights thought might raise the issue under Article 6 of the European Convention on Human Rights.

[10] The Court agreed that this 4th application of L was an abuse of process and contravention of the 1960 Act as the only new issue was the discovery of missing documents; this in turn resulted from the delay in seeking the Malaysian order as to the production of these documents - had it been sought earlier, either the documents would not have been missing or the point would have been available to be taken in HC3. Failure to take an obvious step in due time cannot enable an applicant to claim that there is a novelty which was not fairly available to him on the occasion of an earlier application.

[L's application dismissed.]

Cases referred to:

Atkinson v. United States of America Government [1971] AC 197
Attorney General v. Shamsudin [1987] HKLR 826
Bates v. McDonald [1985] 60 ALR 245
Director of Public Prosecutions v. Humphrys [1976] 63 Cr App R 107 [1977] AC 1
Government of Australia v. Harrod [1975] 1 WLR 745
Grant v. DPP [1982] AC 190
In re Hastings (No. 2) [1959] 1 QB 358
Kakis v. Government of the Republic of Cyprus [1978] 1 WLR 779
Narain v. Director of Public Prosecutions [1987] 70 ALR 697
Oxford City Justices, ex parte Smith [1982] 75 Cr App R 200
R v. Bow Street Magistrates Court, ex parte Van Der Holst [1986] 83 Cr App R 114
R v. Governor of Pentonville Prison, ex parte Osman (No 3) [1989] 91 Cr App R 409
R v. Governor of Pentonville Prison, ex parte Sinclair [1990] 2 QB 112
Reg v. Bow Street Stipendary Magistrate, ex parte Cherry [1989] 91 Cr App R 283
Reg v. Derby Crown Court, ex parte Brooks [1984] 80 Cr App R 164
Rees [1986] 83 Cr App R 128
Reg v. Governor of Pentonville Prison, ex parte Osman [1990] 1 WLR 277
Reg v. Governor of Pentonville Prison, ex parte Tarling [1979] 1 WLR 1417
R. v. Governor of Pentonville Prison, ex parte Teja [1971] 2 QB 274
Reg v. Manchester City Stipendary Magistrate, ex parte Snelson [1977] 1 WLR 911
Reg v. Medical Appeal Tribunal (North Midland Region) ex parte Hubble [1959] 2 QB 408
Scalise [1985] 7 Cr App R (S) 395
Stone [1988] 10 Cr App R (S) 322
Union of India v. Narang [1978] AC 247
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581

Legislation referred to:

Administration of Justice Act 1960 [UK], s. 14(2)
Evidence Ordinance (Chap 8) (HK), ss. 77E, 77F(1)
Extradition Act 1989 [UK], ss. 6(1)(d), 9, 11(3)(c), 37(1) sch. 2, 38(2)
Fugitive Offenders Act 1967 [UK], ss. 4(3), 5(3), 6(1)(b), 7(5), 8(3), 9, 11
Interpretation Act 1978 [UK], s. 17(2)

For the applicant - M. Thomas Q.C., (Mark H. Lomas & J. Mok with him); M/s. Eversheds
For the governor of Brixton Prison - Kevin De Haan (C. Montgomery with him); M/s. Crown Prosecution Service
For the government of Hong Kong - Clive Nicholls Q.C. (G. Grant with him); M/s. MacFarlanes
For the foreign and commonwealth office - Stephen Richards, Treasury Solicitor

JUDGMENT

Mann LJ:

This is the judgment of the Court.

There is before the Court an application for a writ of *habeas corpus ad subjiciendum* dated 5 February 1990. The applicant is Lorrain Esme Osman, who is at present held in custody at Her Majesty's Prison Brixton. He seeks his release from that custody. The respondents to the application are the Governor of (now) Brixton Prison (the governor) and the government of the United Kingdom dependency of Hong Kong (the government). Osman was committed to custody by the Chief Metropolitan Stipendary Magistrate on 1 June 1987. The committal was by an order made under s. 7(5) of the Fugitive Offenders Act 1967 (the FOA). By that order Osman was committed to custody to await return to Hong Kong in respect of 42 out of 43 charges which are referred to in an authority and a supplementary authority to proceed, issued under s. 5(3) of the FOA and dated 26 January and 13 May 1986.

Osman has made three previous applications to this Court for a writ to secure his release from custody. The first application (HC1) was dismissed save in respect of three charges on 30 March 1988 (*Reg v. Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277). The second (HC2) was dismissed on 21 December 1988 (The Times, 24 December 1988). The third (HC3) was dismissed on 17 November 1989 (*R v. Governor of Pentonville Prison, ex parte Osman* (No 3) [1989] 91 Cr App R 409). The appeal committee of the House of Lords dismissed petitions for leave appeal from the decisions of this Court (14 July 1988 (HC1) and 1 February 1990 (HC2 and HC3). The appeal committee on 26 July 1990 dismissed a petition for leave to appeal from a decision of this Court on 20 June 1990, whereby it dismissed a motion by Osman for discovery in the present proceedings.

Osman was born in Penang on 18 December 1931. He is a Malaysian citizen who, we are told, settled at 3 Acacia Place, London NW8 in 1984. Osman describes himself as "a prominent Malay (who) rendered public service on behalf of the Government of Malaysia in a number of appointments". In 1966 Osman became a founding member and director of Bank Bumiputra Malaysia Berhad (BBMB). That bank was established by the Government of Malaysia to further the business interests of the indigenous Malay population (the Bumiputras). It was and is government funded. The chairmen have been appointed by the Prime Minister of the day. The chairmen during the period with which we are concerned were Tan Sri Kamarul Ariffin (March 1976 to March 1982) and Dr. Nawawi Mat Awin (March 1982 to December 1984). The activities of the bank were overseen by Bank Negara (the Federation's central bank) and the government.

On 1 March 1974 there was incorporated in Hong Kong a subsidiary company of BBMB named Bumiputra Malaysian Finance Ltd. (BMFL). BMFL commenced business in Hong Kong in 1977. Although a licensed deposit taker, most of its funds were provided by BBMB from petro-dollars deposited with BBMB by the national oil corporation. Osman was chairman of BMFL. The two other directors were Dato Hashim Shamsudin and Dr. Rais Saniman. Shamsudin is now in prison in Hong Kong where he is serving a sentence of ten years' imprisonment imposed on 23 April 1987 after having pleaded guilty to charges arising out of transactions material to Osman's committal. Saniman has recently been extradited from France to Hong Kong where he is to face similar charges. The general manager of BMFL was Ibrahim Jaafar, who was concerned with the transactions, who is in Hong Kong and who was granted immunity from prosecution there on 21 June 1985. He would be an important witness against Osman should a trial occur in Hong Kong.

The offences in respect of which Osman was committed to custody are alleged to have occurred between the month of December 1979 and 31 October 1983. The offences are offences of conspiracy to defraud, conspiracy to steal, false accounting and receipt of corrupt payments. The offences are said to concern advances made by BMFL to companies within the Carrian Group. That was a group of companies in Hong Kong controlled by George Tan, who is Chinese. The advances amounted to the equivalent of US$800 million. Put very generally, the prosecution case is that the advances were dishonestly made for they were irregular, concealed from scrutiny, advanced to insubstantial companies and inadequately secured. The prosecution would say that the corrupt payments were received by Osman not as general "sweetners", but in return for facilitating the advances to the Carrian group. Put very generally, the case for Osman would be (as we understand it) that the advances were secured and the security, although transformed, is extant, the advances were not concealed from BBMB which knew of and authorised them, and that BMFL's practice in lending was no different from that of BBMB. The cases for prosecution and defence are here put in simple terms, but such simplicity suffices for present purposes. The cases at trial would be complex in their deployment.

The Carrian Group suffered a crisis in its liquidity in October 1982 and it thereafter collapsed despite schemes of rescue in which BBMB is said to have participated. The effect of the collapse on BMFL was such that on 31 December 1983, the bad debts were assigned to BBMB (which was in turn covered by Petrolian Nasional Berhad). The effect of the collapse upon BBMB and BMFL caused concern in Malaysia and, according to Osman, political embarrassment to the government of the Federation by reason of the lending of Malaysian money to Chinese interests in Hong Kong, of BBMB's participation in a scheme or schemes of rescue and of questions as to the extent to which members of the government knew of what had occurred. The government did not appoint a Royal Commission to investigate what had occurred, despite requests that it should do so. Instead in April 1984, BBMB set up an internal committee of inquiry, whose chairman was Tan Sri Dato Ahmad Noordin. That committee presented its final report on 5 December 1985. It had on 17 August 1984 submitted an interim report. There were also submitted a number of "briefs", at least some of which, bear on activities which are now the subject of committal charges. The briefs bear dates between 9 November 1984 and 5 December 1985. Three of those briefs were received in Hong Kong on 11 April 1985 by the Independent Commission Against Corruption (ICAC), and were the basis of the ICAC investigations which followed. The ICAC is a commission established in Hong Kong by the Independent Commission Against Corruption Ordinance (Chapter 204 of the Laws of Hong Kong) and it consists of a Commissioner, a deputy commissioner and other officers. Its functions are sufficiently apparent from its title.

In early 1983 Jalil Ibrahim was sent from Malaysia to Hong Kong as the assistant general manager of BMFL. The ostensible purpose of his visit, according to Osman, was to assist with a scheme to rescue the Carrian Group. On 19 July the body of Jalil was found in a banana plantation. He had been murdered. The Serious Crimes group of the Hong Kong police investigated the murder. In the course, and for the purposes of, their investigation (which resulted in the trial and conviction of a Malaysian named Mak Foon Tuhan in May 1984) the group enlisted the help of the Commercial crimes Bureau of the Hong Kong police to assist and analyse documents taken from the offices of BMFL. The activities of the police came to the attention of BBMB whose board on 12 September 1983 passed this resolution:

> Decided that Encik Wong Aun Phui (adviser to BBMB) and Dr. Rais Saniman (senior general manager of BBMB and alternate director of BMFL) should brief the Minister of Foreign Affairs

> so that the Minister, through the British High Commission in Malaysia, could seek co-operation of the British Government and the Hong Kong Authorities to limit police investigations to matters related to late Jalil's murder only.

Mr. Martin Thomas QC, for Osman, submitted to us that this resolution showed that the Hong Kong Government was to be told to "lay-off". Whether it was so told must be a matter for speculation, but it must importantly be observed that the then current investigations were in the context of a murder inquiry and not of a commercial fraud. Osman in para. 25(6) of his affirmation of 15 June 1990, after having referred to this investigation, deposes that he was:

> informed by a Senior Malaysian Police Officer that he had made official inquiries of the Hong Kong authorities and had been assured that the outcome of the said investigations by the (Commercial Crime Bureau and the Serious Crime Group) was that there would be no prosecution against me in respect of the affairs of BMFL.

This is double hearsay. The sources are not named. We attach no weight whatever to the statement.

The Noordin Committee's "briefs" arrived at the ICAC on 11 April 1985. The ICAC thereafter investigated in accord with the duty imposed upon the Commissioner by s. 12 of the ICAC's Ordinance of establishment. On 30 November 1985 a Magistrate in Hong Kong on the information of Anthony Edmund Robey (an assistant director of ICAC) issued a warrant for the arrest of Osman. On 2 December a provisional warrant was issued upon the information of a police inspector by a metropolitan stipendary Magistrate in the exercise of his powers under s. 6(1)(b) of the FOA. Osman was arrested under that warrant on 6 December 1985 and has remained in custody ever since. Unsuccessful applications for bail were made in 1986 and 1989 (twice). Further warrants of arrest were issued in Hong Kong on 20 January and 24 April 1986 and on 21 January and 28 April 1986 the Governor of Hong Kong signed requests to the Secretary of State such as are referred to in s. 5(1) of the FOA. The two consequent authorities to proceed we have referred to already. The first recited the offences in the warrant of 20 January and the second recited the offences in the warrant on 24 April.

The committal proceedings commenced on 27 May 1986 and lasted for 66 working days until 22 May 1987. On 1 June 1987, Osman was committed on 42 charges (one had been withdrawn during the hearing). The Chief Metropolitan Magistrate gave reasons for his decision. He said (at p. 3):

> May I first deal perhaps with the most important factor of all in this case, as it seems to me that most, if it all, of the charges depend on whether there is *prima facie* evidence of dishonesty. I say at once that in my view there is ample material upon which to say that the activities of the defendant were *prima facie* dishonest.

On 10 June 1987 Osman applied for a writ of *habeas corpus*. The application was heard over 19 days and was dismissed on 30 March 1988 (HC1). The decision established that all of the charges were charges which were within the jurisdiction of the Hong Kong Courts to try and that the committal was evidentially proper save as to three charges arising from one of the eleven loan transactions involved. After the application but before the decision in HC1, the Foreign and Commonwealth Office received in May 1987 a claim from the Liberian Embassy in London that Osman was entitled to diplomatic immunity as having been appointed on 25 October 1985 an ambassador-at-large of the Republic of Liberia to the countries of the European community. This led to an exchange of diplomatic notes and to a second application for *habeas corpus* made on 8 June 1988 and which was dismissed on 21 December 1988 (HC2).

On 9 November 1988, Osman obtained leave to apply for judicial review in the High Court of Hong Kong. The decision to be impugned was the Magistrate's decision to issue the warrant of 30 November 1985. The High Court dismissed the application but on 4 May 1989 the Court of Appeal of Hong Kong allowed an appeal, quashed the warrant but refused to grant a declaration that the laying of the information by Mr. Robey did not properly amount to the laying of an information before a Magistrate for the purpose of commencing criminal proceedings against Osman. It was suggested by Mr. Clive Nicholls QC for the government, that the point concerning the circumstances in which the warrant was issued should have been investigated and raised before November 1988. The immediate cause of the inquiries in fact made and leading to the warrant point, was a statement by Counsel for the government in the High Court of Malaya on 7 September 1988 that the proceedings against Osman had commenced on 30 November 1985, but a similar statement said Mr. Nicholls, had been made in that Court on 18 April 1986. We think that which agitated enquiry in 1988 ought to have had that effect in 1986, but we do not attach significance to the point.

Osman sought to raise the invalidity of the warrant in HC2, but the Court declined to deal with the matter as the proceedings in Hong Kong were then pending. The invalidity of the warrant was raised in further proceedings for a writ of *habeas corpus* commenced by application on 6 June 1989. It was suggested that the invalidity of the warrant rendered invalid the provisional warrant of 2 December 1985 and that the fall of that *domino* caused the sequential fall of all the other *dominos* up to and including the order of committal of 1 June 1987. This Court held, in the words of Parker LJ, that:

> the validity or otherwise of such original warrant was irrelevant (91 Cr App R 421)

and dismissed the application (HC3). Osman's limited victory on 4 May 1989 has been and is, devoid of consequence here and, so far as we are aware, anywhere.

During the course of the proceedings in HC3 there were, on 21 October 1989, produced at the request of the Court nine documents. Those documents were the inspiration for the present application in so far as it related to the motive of the government, and also inspired the motion for discovery herein of further documents which was dismissed on 20 June 1990 by Leggatt LJ and Nolan J. On 14 November this Court acceded to a motion by the Foreign and Commonwealth Office that the nine documents were subject to public interest immunity and were in any event to be treated as irrelevant. Reasons were given for our decision (The Times, 28 November 1990). As was explained in those reasons we had in the peculiar circumstances, read the nine documents, and it is right for completeness in this judgment to record our agreement expressed on that occasion with Leggatt LJ (with whom Nolan J agreed) when he said that:

> there is nothing (in the nine documents) to show or suggest that the Hong Kong Government had any other motive in proceeding against the applicant than his prosecution for crimes alleged to have been committed by him for which the Courts of Hong Kong admittedly have jurisdiction to try him.
>
> (Transcript p. 20D).

Mr. Thomas pursued his application for a writ by reference first to statute and second to the inherent jurisdiction of a Court to prevent an abuse of process. The relevant statutory provision was s. 8 of the FOA. The whole of that Act was repealed by s. 37(1) of and Schedule 2 to the Extradition Act 1989 (the Act of 1989). That Act is a consolidating enactment which came into force on 28 September 1989 (s. 38(2)). It enacts (albeit with some modifications) the provisions of the FOA. The provision which now corresponds to the repealed section is s. 11 which provides, so far as is now material:

(1) Where a person is committed under s. 9 above, the Court shall inform him in ordinary language of his right to make an application for *habeas corpus*, and shall forthwith give notice of the committal to the Secretary of State.

(2) A person committed shall not be returned:

(a) in any case, until the expiration of the period of 15 days beginning the day on which the order for his committal is made;

(b) if an application for *habeas corpus* is made in his case, so long as proceedings on that application are pending.

(3) Without prejudice to any jurisdiction of the High Court apart from this section, the Court shall order the applicant's discharge if it appears to the Court in relation to the offence, or each of the offences, in respect of which the applicant's return is sought that

(b) by reason of the passage of time since he is alleged to have committed it ... or

(c) because the accusation against him is not made in good faith in the interests of justice,

it would, having regard to all the circumstances, be unjust or oppressive to return him.

If it be objected that the section is inapplicable to Osman because he was committed not under "s. 9 above" but under s. 7 of the FOA, then the objection is met by s. 17(2) of the Interpretation Act 1978, which provides so far as is material:

Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears.

(b) in so far as any...thing done under the enactment so repealed could have been...done under the provision re-enacted, it shall have effect as if done under that provision.

Section 7 of the FOA is re-enacted with modifications by s. 9 of the Act of 1989 and accordingly in our view the committal of 1 June 1987 now has effect as a "thing done" under s. 9 of the Act of 1989. We shall return to the meaning and effect of s. 11.

We turn to Mr. Thomas's second point of reference, that is to say, the inherent jurisdiction of a Court to prevent an abuse of process. We use this expression "a Court" because there are two Courts to be considered, that is to say, the Court of committal and this Court. We take first the Court of committal. It has in recent years and on many occasions, been decided, or (more often) assumed or conceded in this Court that Magistrates who hold domestic committal proceedings are invested with inherent jurisdiction to prevent an abuse of the process of committal. Whether the decisions, assumptions and concessions are correct was not a question argued before us, but it was assumed by all parties that they are correct. There may be a question to be resolved, but this is not the occasion for its resolution. We shall make the prevalent assumption but after so doing we are confronted with the question of whether a Magistrate who holds extradition committal proceedings is invested with an inherent jurisdiction to prevent an abuse of the process of extradition committal. There are observations which might be taken as suggesting that he is not, and **must**, without regard to abuse of process, commit if the statutory preconditions are met (see: *Atkinson v. United States of America Government* [1971] AC 197, at 232E per Lord Reid; *Government of Australia v. Harrod* [1975] 1 WLR 745 at 756H per Viscount Dilhorne). The correct approach may now be different. In recent cases this Court has been prepared to assume that in accusation cases (as opposed to conviction cases) an examining Magistrate is invested with an inherent jurisdiction to refuse to implement an order to proceed where there is an abuse of process.

Thus: *R v. Secretary of State for the Home Department, ex parte Rees* [1985] unrep. (CO/974/84). *R v. Bow Street Magistrates Court, ex parte Van Der Holst* [1986] 83 Cr App R 114. *R v. Governor of Pentonville Prison, ex parte Sinclair* [1990] 2 QB 112. *R v. Governor of Pentonville Prison, ex parte Chinoy* [1990] unrep. (CO/792/89).

The case of *Rees* went to the House of Lords and is reported at [1986] 83 Cr App R 128. Lord Mackay of Clashfern delivered the leading speech and said this (at p. 144):

> I consider it inappropriate in this appeal to deal with questions (6) and (7) which asked whether the police Magistrate or the High Court has jurisdiction to prevent the abuse of process in respect of proceedings under the (Extradition Act) 1870 since it is not necessary to answer them to dispose of the appeal, and the answer might well depend on the circumstances in which the relevant abuse of process occurred.

The position is open. Mr. Thomas asserted that the assumption stated in *ex parte Sinclair* (see [1990] 2 QB at 128D) should here be made. Mr. Nicholls for the government accepted for the purpose of these proceedings that it could be, but Miss Clare Montgomery for the governor, in the course of a lucid and penetrating argument to which we pay tribute, submitted that a committing Magistrate has no jurisdiction to refuse a committal on the basis of abuse of process. She said that the observations in *Atkinson* and *Harrod* remain correct for the reasons given therein and that to hold otherwise would be inconsistent with the scheme on which the FOA was based (see Cmnd 3008). However, granted the positions adopted by Mr. Thomas and Mr. Nicholls and the current practice of this Court, we do not think it would be right for us to do other than proceed on the basis that the committing magistrate does have jurisdiction to prevent an abuse of the committal process. The circumstances in which the jurisdiction may come to be exercised cannot be defined, but for any purpose of the present case it is sufficient to go to the well-known words of Sir Roger Ormrod in the case reported under the mistaken name of *Reg v. Derby Crown Court, ex parte Brooks* [1984] 80 Cr App R 164:

> In our judgment, bearing in mind Viscount Dihorne's warning in *Director of Public Prosecutions v. Humphrys* [1976] 63 CR App R 107 [1977] AC 1, that this power to stop a prosecution should only be used 'in most exceptional circumstances,' and Lord Lane CJ's similar observations in *Oxford City Justices, ex parte Smith* [1982] 75 Cr App R 200, which was specifically directed to Magistrates' Courts, that the power of the justices to decline to hear a summons is 'very strictly confined,' the effect of these cases can be summarised in this way. The power to stop a prosecution arises only when it is an abuse of the process of the Court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service.

If the Magistrate has an inherent jurisdiction to prevent abuse of the extradition committal process, then also must this Court on an application for prohibition should the Magistrate either not admit the jurisdiction or decline to exercise it. If he admitted the jurisdiction, then his exercise of it could be challenged here by *certiorari* or, where committal has occurred, on an application for *habeas corpus*. In the present case no one suggested that the absence of a point upon abuse before the Magistrate prevented that point being raised here. We assume that it can. We are conscious that we have now piled assumption upon assumption.

The resulting edifice is, however, favourable to the accommodation of the applicant's arguments. We should add that if the Magistrate does not have jurisdiction in an accusation committal, it is for consideration whether this Court would have jurisdiction by virtue of its supervisory powers (cp. *Reg v. Manchester City Stipendary Magistrate, ex parte Snelson* [1977] 1 WLR 911 at 913F). This point also was left open in *Rees*.

It is important to appreciate that the process which is protected by an exercise of the jurisdiction is the committal process. There is no other process to be identified. Thus the question can here be put: were the proceedings culminating in the order of 1 June 1987 an abuse of process?

That this Court has an inherent jurisdiction to prevent an abuse of its own process is not in dispute. In this case the jurisdiction is invoked by Mr. Nicholls, who contends that this fourth application for a writ of *habeas corpus* is both an abuse of process and a contravention of s. 14(2) of the Administration of Justice Act, 1960. To that contention we shall return, but for the moment it suffices to say that there is no other perceptible basis on which our jurisdiction to protect our own could be invoked by either Osman or the respondents.

It scarcely needs stating, but stated it ought to be, that this Court is not concerned with whether or not to try Osman in Hong Kong would be an abuse of the process of the Court of trial by reason, for example, of the elapse of time. A matter such as that is entirely a matter for the local Court.

In seeking to bring his case within s. 11 of the Act of 1989 or the concept of abuse or both, Mr. Thomas placed before us six matters which he invited us to consider in the context of our powers. They were, in no particular order:

(1) elapse of time,

(2) the absence of certain documents,

(3) the motive of the accuser,

(4) the likely absence of some witnesses from a trial in Hong Kong,

(5) publicity, and

(6) the personal circumstances of Osman.

We shall deal separately with each of these matters.

(1) ***Elapse of Time***

The period of time and certain of the events occurring within it have already been mentioned. Some other events will be mentioned later.

(2) ***Missing Documents***

Certain BBMB documents were placed before the Magistrate early in the committal proceedings. Those were documents which had been perused by ICAC when it was first investigating the case, but the copies which were supplied on request by BBMB to ICAC had excised from them matters which BBMB considered confidential, irrelevant or both. Counsel for Osman complained during the proceedings that the documents available were and are an edited selection. Counsel for the government and the Magistrate had, and expressed, sympathy with this complaint. BBMB remained unco-operative. The difficulty was

resolved by the Attorney-General of Hong Kong obtaining on 4 November 1986 an order from the High Court of Malaya for the production and inspection of a wide range of BBMB documents. The form of the order is so wide that it could be described as an order for general discovery. The rights to production and inspection were exercised by Clifford Howard Allison, who was a member of the Attorney-General's chambers. He had produced to him 5,439 documents and files. They are listed and described at p. 44 to 260 of exhibit "AK/1" to Anad Krishnan's affirmation, dated 24 October 1990. Mr. Allison selected from the documents produced documents additional to those already before the Magistrate, which he considered material to the case. The good faith of Mr. Allison's selection was expressly not impugned before us. The substantial further selection was served upon Osman's advisers on 16 December 1986.

Osman's advisers were anxious to see all of the documents which Mr. Allison had examined in November 1986 for themselves. They engaged in correspondence in the autumn of 1988 with the Attorney-General's chambers **who had not got** the documents and who sensibly suggested on 28 September 1988 that Osman should seek an order in Malaysia. The advisers engaged in a protracted correspondence from early 1989 with BBMB **who had got** the documents, which culminated in a visit by Osman's solicitor to the premises of BBMB on 10 September 1990, when he was told that without a Court order BBMB would produce only those documents upon which the government had relied during committal. An order was sought (as had been suggested on 28 September 1988) and was obtained on 20 September 1990. It ordered the production for inspection of the 5439 documents and files. BBMB applied to set aside the order, but their application was dismissed and inspection commenced on 15 October. Of the 5,439 documents and files listed by Mr. Allison 3480 were missing. A member of the secretary's office of BBMB (Cik Zanyah Wan Chik) apparently said that the missing documents "are presently untraceable". On 19 October BBMB wrote that it was "trying its utmost" to trace the "missing and misplaced documents". At the conclusion of the hearing before us no more had been heard from BBMB.

Osman does not, of necessity, know what is in the 3,480 documents and files. However, from their description in Mr. Allison's list (contained in AK/1) many of them **may** be relevant to Osman's defence. The untraced documents are discussed in Osman's affirmation of 29 October 1990 para. 37 *et seq*. We find it unnecessary to rehearse the discussion.

(3) ***The Motive of the Accuser***

Mr. Thomas impugns the motives of the government in its capacity as "accuser'. It was, he said, tainted with the party political motives of the Malaysian Government and of its creature BBMB, who were anxious to avoid the embarrassment of a trial in Malaysia and to have the trial of a scapegoat (Osman) in Hong Kong. Mr. Thomas said the government had "eaten the fruit of a poisoned tree", and in consequence its initiation of the proceedings was not "in good faith in the interests of justice" (see s. 11(3)(c) of the Act of 1989) and was also an abuse of the committal process. Mr. Thomas relied, and relied in the end only, upon what he described as the government's "reversal of the decision not to investigate Osman". He points to the investigation in mid-1983, which closed and to the inquiries which commenced after receipt of the three Noordin briefs in April 1985.

We regard Mr. Thomas's contention as quite unsustainable. We say nothing of the aspirations of the Malaysian Government or of BBMB, but we are satisfied that there is no evidence whatever that the government had any motive other than that of bringing to justice a person whom it alleges committed offences within its jurisdiction. In particular the interval 1983 to 1985 is devoid of significance. The early investigation was an investigation into a

murder. The investigation produced a conviction in 1984. The investigation into the committal charge was commenced by ICAC (which played no part in the murder inquiry) in April 1985 upon receipt of the briefs.

We have assumed, as will have appeared, that the "accusation" for the purposes of s. 11(3)(c) of the Act of 1989, was by the government. Both Mr. Thomas and Mr. Nicholls argued on that basis. Miss Montgomery drew our attention to *Narain v. Director of Public Prosecutions* [1987] 70 ALR 697, which was a decision of the Federal Court of Australia and which considered a provision in a local statute materially identical in terms to s. 11(3)(c). At p. 708 of the report Wilcox and Jackson JJ concluded that:

> accusation is used...to refer to the formal proceedings by which the prosecution was commenced.

If that be correct, then the proceedings in the present case were commenced by Mr. Robey when he laid his information on 30 November 1985. There is no suggestion that he acted otherwise than in good faith (as to good faith in this context, see *Bates v. McDonald* [1985] 60 ALR 245, 255).

(4) ***The Likely Absence of Witnesses from Hong Kong***

The only witnesses for either prosecution or defence who would be compellable in a Hong Kong trial would be persons within Hong Kong. Other persons whose evidence was required by prosecution or defence, would have to either attend voluntarily or be the subject of letters of request to a foreign Court issued under s. 77E of the Evidence Ordinance (Chapter 8 of the Laws of Hong Kong). In fact, the government on 13 December 1985 obtained letters of request for the collection of evidence in Malaysia. On 16 December the High Court of Malaya issued an order for the examination of witnesses in Malaysia and 44 witnesses were examined. A further hearing for examination took place on 7 September 1988 pursuant to a liberty in the original order. On 17 March 1989 Osman obtained a letter of request for the collection of evidence in Malaysia and on 22 March the High Court of Malaya made an order for the examination of seven witnesses in Malaysia at a date to be fixed. No such examination has yet occurred, and on 30 March 1989 the government reserved its position as to whether the letters of request had been prematurely sought.

It is in no way surprising that in a trial of these charges there would be witnesses in Malaysia and witnesses in Hong Kong. A head count is inappropriate because it cannot now be known whose evidence will be required, but it suffices to say that there are likely to be substantial numbers in both countries. Who would attend from Malaysia in Hong Kong on some future date cannot be determined. We were informed by the government of the position as at 15 June 1990 when it was expected on the basis of what he said on 14 March 1989, that Senator Ariffin would make himself available, but nothing was known by the government as to Dr. Nawawi's intentions. Osman regards the cross-examination of Senator Ariffin and Dr. Nawawi as a critical part of his defence.

Although evidence given in a Malaysian Court as a result of a letter of request is open to local cross-examination - for reasons which seem good to him - Osman has not so far sought to avail himself of this opportunity - it is not evidence before the jury in the Court of trial. It is not surprising that the law of Hong Kong makes provision in regard to evidence taken abroad. Section 77F(1) of the Evidence Ordinance provides for the admission of a deposition in criminal proceedings as *prima facie* evidence of any fact stated in it if, having regard to the specified matters, the Court is satisfied "no unfairness is likely to occur in (the) proceedings consequent upon the deposition".

(5) ***Publicity***

As might be expected, there has since the autumn of 1982 been extensive coverage in the press in Hong Kong and Malaysia of a story involving the collapse of a business empire, large sums of money, murder, criminal trials, resistance to extradition and politics. We were taken to some of that publicity and were provided with all of it. Our attention was not drawn to anything specifically hostile to Osman. He is placed as a character upon the stage,

(6) ***The Personal Circumstances of Osman***

Mr. Thomas drew our attention to the matters which follow. That Osman will be 59 years of age on 18 December next. That he was nearly 54 when first taken into custody. That he has a right of abode in the United Kingdom and settled here in 1984. That he is a Malay and fears trial in an alien jurisdiction where the dominant ethnic group is Chinese, whose hostility might be excited by the policy of positive discrimination in favour of Malaysians practised in Malaysia (no point was taken by reference to s. 6(1)(d) of the Act of 1989).

Under this head Mr. Thomas also suggested it was material that Osman if tried, convicted and sentenced in Hong Kong would not receive any discount from his sentence on account of the period spent in custody awaiting extradition. This was a false point. The position of a sentencer in Hong Kong is no different from a sentencer in England. He can give a discount, although the amount of it may be reduced if the sentencer thinks that the defendant was "playing the system" abroad (*Scalise* [1985] 7 Cr App R (S) 395; Stone [1988] 10 Cr App R (S) 322; *Attorney General v. Shamsudin* [1987] HKLR 826, 832C).

Thus of the six matters which Mr. Thomas put before us for consideration in the context of our powers, five now remain for consideration. The sixth (motive) we have rejected on the evidence.

The elapse of time is relevant in regard both to s. 11(3)(c) of the Act of 1989 and to abuse of process. The predecessor of s. 4(3) (s. 8(3) of the FOA) was considered by the House of Lords in *Union of India v. Narang* [1978] AC 247 and *Kakis v. Government of the Republic of Cyprus* [1978] 1 WLR 779. Observations in the speeches in those cases were much referred to in the course of argument and guide us in our approach to s. 4(3)(c) and to its application. Our particular attention was drawn to the following passages in *Narang*:

(1) Viscount Dilhorne at p. 272B:

> Whether the application to the Court under s. 8(3) be on the ground of the triviality of the offence or of the passage of time or of *mala fides*, the Court is required to have regard to all the circumstances. In my opinion this can only mean circumstances relevant to the particular ground or grounds on which the application for release is based. Where that is sought by reason of the trivial nature of the offence, only circumstances relevant to the nature of the offence are to be regarded, for to order a person's release on that ground it must appear to the Court that it would be unjust or oppressive to return him by reason of the trivial nature of the offence and not for any other reason.
>
> Where the application is, as it was in this case, on the ground that it was unjust or oppressive to return him by reason of the passage of time, I agree with Slynn J that the circumstances to which regard may be had must be relevant to the question whether or not it would be unjust or oppressive to return a person because of the passage of time: see also per Lord Packer CJ in *Reg v. Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274, 290.

(2) Lord Morris of Borth-y-Gest at p. 280D:

> The circumstances must all relate to the passage of time and relate to the question whether there would be injustice because of the passage of time if an order to return was made.
>
> The circumstances will naturally have arisen during the period of the passage of time but not all such circumstances will be relevant. Those in contemplation are primarily the circumstances which have relation to the trial which, after a return, is to take place and to the defence to charges to be made and to the question whether 'by reason of the passage of time' it would be unjust to a person to return him to take his trial.

(3) Lord Fraser of Tullybelton at p. 290A:

> The importance of the provision that regard is to be had to all the circumstances is, in my opinion, that it requires the Court to consider all the circumstances of the particular applicant and not to apply any general rule of thumb. But it is only if the passage of time, operating in those particular circumstances, would cause injustice or oppression that the condition for the Court to make an order is satisfied.

Our particular attention was drawn to the following passages in *Kakis*:

(1) Lord Diplock at p. 782G:

> My Lords, the passage of time to be considered is the time that passed between the date of the offence on 5 April 1973, and the date of the hearing in the Divisional Court on 15 December 1977, for that is the first occasion on which this ground for resisting extradition can be raised by the accused. So one must look at the complete chronology of events that I have summarised above and consider whether the happening of such of those events, as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now.
>
> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude.

(2) Lord Edmund-Davies at p. 285C disagreed upon responsibility for delay. He said:

> In my respectful judgment, on the contrary, the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues on injustice and oppression. Thus, the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and oppressiveness of making an order for his return, whereas the issue might be left in some doubt if the only known fact related to the extent of the passage of time, and it has been

customary in practice to avert to that factor; see, for example, *R v. Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274, 290 per Lord Parker CJ and the speeches in this house in *Union of India v. Narang* [1978] AC 247.

(3) Lord Russell of Killowen at p. 785F:

> I would only add this comment on s. 8(3)(b) of the statute. It is not merely a question whether the length of the time passed would make it unjust or oppressive to return the fugitive. Regard must be had to all the circumstances. Those circumstances are not restricted to circumstances from which the passage of time resulted. They include circumstances taking place during the passage of time which may (as I think here) give to the particular passage of time a quality or significance leading to a conclusion that return would be unjust or oppressive.

(4) Lord Scarman at p. 790E:

> For the purposes of this jurisdiction, time is not an abstraction but the necessary cradle of events, the impact of which upon the applicant has to be assessed.

The passage of time in this case commences on various dates according to which offence is to be considered, but the dates are between the month of December 1979 and 31 October 1983. The passage of time must end on "the first occasion on which the ground for resisting extradition can be raised by the accused" (Lord Diplock [1978] 1 WLR at 782G). We assume for the present that first occasion was the hearing before this Court which commenced on 12 November last. The length of time on that assumption is long, but the passage of time has not been due to any dilatoriness on the part of the government who "cannot properly be held blameworthy in the matter of the passage of time" ([1978] AC at p. 285A) since the commission of the offences. ICAC commenced its inquiry as to the offences in April 1985; the information was laid on 30 November 1985. There is no lack of diligence to be seen. Thereafter the government, in our view, proceeded with promptitude. The committal proceedings lasted 66 days but that was no fault of the government. Since committal there have been a few days when there has not been a pending application for *habeas corpus*, a pending decision on such an application or a pending petition for leave to appeal against a decision refusing an application (see the chronology in Exhibit "CMA7" referred to in the affidavit of Caroline Mary Adkins, dated 26 October 1990). Osman was entitled to pursue those remedies, but their pursuit must have been recognised by him to be consumptive of time, during which unpalatable events could occur (cp. *Grant v. DPP* [1982] AC 190, 192A).

There being no blame which can be attached to the government, we turn to whether the circumstances, events or matters relied upon by Mr. Thomas were events occurring during the lapse of time, which render it unjust or oppressive to return Osman. We can at once dismiss personal circumstances. Age and settlement can be factors to be taken into account (see [1978] AC at p. 290C), but we find no hardship (that is to say, oppression) in returning a man whose age has increased to 59 during the lapse of time or whose settlement during the elapse of time endured between an unknown date in 1984 and his arrest on 6 December 1985. The circumstances that Osman is a Malay and the place of trial would be Hong Kong are not circumstances arising during the elapse of time.

Publicity has occurred during the elapse of time, but although the longer the time the longer the publicity, we do not find that this gives rise to a risk of prejudice to Osman at his trial. None of the publicity is specifically adverse to Osman and any possibility of prejudice could be dispersed by the trial Judge. Juries in this country are frequently admonished in regard to newspaper reports.

The location of witnesses as being in Malaysia or in Hong Kong, even if it be regarded as a circumstance occurring within or related to the elapse of time, is not a circumstance which would make it unjust to return Osman. That witnesses and documents are in different jurisdictions must be a common-place in international fraud trials, and in Hong Kong as we have explained, there are protective provisions as to the admission of depositions taken abroad. There is no reason to suppose that Osman would not obtain a proper consideration of those provisions.

That documents had become "missing" since December 1986 was discovered on 15 October 1990 when inspection pursuant to the order of 20 September 1990 was made. There is no discernible reason why the order could not have been sought earlier than it was. Had it been, the documents may not have become "missing". However that may be (and we shall revert to it) the circumstance or event of documents having become "missing" does not persuade us that it would be unjust to return Osman. Although the description of the documents given by Mr. Allison suggests that many of them may be relevant to Osman's defence, it is a matter of speculation whether they are so. The position is different from that in *Kakis* where Lord Diplock was able to say (at p. 784A):

> It would detract significantly from the fairness of his trial if he were deprived of the ability to adduce the evidence of the only independent witness who could speak to it.

We can make no such statement as to the documents because whether the absence of the documents would be a significant detraction is necessarily unknown. However that may be, and we recognise that the point is a harsh one, we are not prepared to assume that BBMB will not trace the documents. BBMB is subject to the tardily obtained (as we think) order of 20 September of this year and we do not assume that the process of the Malaysian Court will be ineffectual. What may be traceable and ultimately available at trial is today only a matter for speculation. This Court must not act upon a speculation and, accordingly, we do no accept the argument upon the missing documents. If they remain untraced, then their absence will be for consideration by the Court of trial. We will return to the documents in another context.

We have dismissed Mr. Thomas's factors in regard to time one by one. If it be objected that we should have considered them in the aggregate, we answer that in aggregate we find them no more indicative of success than we do when they are individually examined.

It was also argued by Mr. Thomas as we understood him, that regardless of "circumstances", the elapse of time between the commission of the offences and today was such that prejudice to a fair trial should be presumed so that a return would therefore be unjust. We were not referred to any authority upon s. 11 of the Act of 1989 or its predecessor which supports such a proposition. It is a proposition to the effect that the passage of time, regardless of events occurring during that passage, is enough. This seems to us to be insufficient for the purposes of s. 11(3)(b) which regards time as being "the cradle of events" ([1978] 1 WLR at p. 790E per Lord Scarman). It is events within the elapsed time which are to be considered and it is to a consideration of the events for which Mr. Thomas propounded an evidential basis that we have applied ourselves.

Mr. Thomas relied upon time as demonstrating an abuse of process by the government for, he said, prejudice and unfairness may in that context be presumed from mere delay (see *Reg v. Bow Street Stipendary Magistrate, ex parte Cherry* [1989] 91 Cr App R 283, 300). It must be remembered, however, that the only process initiated by the government (and therefore the only process which could be the subject of abuse) was the extradition process. There

was, in our judgment, no delay in the initiation of that process. There was no interval before (or indeed after) initiation which could be stigmatised as "delay" by the government in the necessarily complex circumstances of the case.

We should add before departing from the applicant's case that Mr. Thomas drew our attention to Article 6 of the European Convention of Human Rights, which provides for a person to be entitled to "a fair...hearing". This article, he said was a factor in considering an extradition case. In the *Soering* case (1/1989/161/217) the European Court of Human Rights said (at para. 113):

> The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.

We do not decide whatever this is or can be a factor to be considered by this Court. Suffice it to say there is not here anything which could suggest the risk of "a flagrant denial" such as the European Court thought might raise an Article 6 issue.

Mr. Nicholls argued that, whether we thought of Mr. Thomas's six matters, for him to raise them at all was an abuse of process of this Court and a contravention of s. 14(2) of the Administration of Justice Act 1960. He referred us to the decision of this Court in *Reg v. Governor of Pentonville Prison, ex parte Tarling* [1979] 1 WLR 1417. The judgment of the Court was delivered by Ralph Gibson J (as he then was). He said at p. 1422G:

> First, it is clear to the Court that an applicant for *habeas corpus* is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the Court.
>
> The true doctrine of estoppel known as *res judicata* does not apply to the decision of this Court on an application for *habeas corpus*: we refer to the words of Lord Parker CJ delivering the judgment of the Court in *In re Hastings* (No. 2) [1959] 1 QB 358, 371. There is, however, a wider sense in which the doctrine of *res judicata* may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: see the judgment of the Privy Council, Lord Morris, Lord Cross and Lord Kilbrandon, in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. In our judgment, that principle is applicable to proceedings for *habeas corpus*, whether under the Act of 1967 or under the general jurisdiction of the Court, although, no doubt, the stringency of the application of the principle may be different in cases concerning the liberty of the subject from that in cases concerning such matters as disputes upon property.
>
> Secondly, it is also clear to the Court that, in s. 14(2) of the Administration of Justice Act 1960 in the phrase 'no such application shall again be made...on the same grounds...unless fresh evidence is adduced in support of the application; the words 'fresh evidence' are used in that meaning which is well known and established in such contexts, namely, not merely evidence additional to or different from the evidence before the Court on the first occasion, but evidence which the applicant could not have put forward on the first application, or which he could not then reasonably be expected to have put forward: see *Johnson v. Johnson* [1900] p. 19 and *Reg v. Medical Appeal Tribunal (North Midland Region) Ex parte Hubble* [1959] 2 QB 408.

Mr. Nicholls said that abuse of the committal process, the motive of the accuser, the absence of witnesses from a trial in Hong Kong, personal circumstances, publicity and the then current elapse of time were points fairly available to Osman at the time of HC1, HC2 or HC3, but which were then not taken by him. We agree with Mr. Nicholls. All that is "new" is the

discovery that documents are "missing". That there is novelty is due to the inexplicable delay in seeking the Malayan (*sic*) order. Had it been sought earlier (for example, in September 1988) either the documents would not have been missing or the point would have been available to be taken in HC3. We do not think that failure to take an obvious step in due time can enable an applicant to claim that there is a novelty which was not fairly available to him on the occasion of an earlier application.

The principle in *Tarling* satisfies us that this application is an abuse of process and contravention of statute. For that reason, in addition to the others which we have given, we would dismiss this application.

We were told that Osman's resistance to extradition has lasted longer than any other has ever done. He has now served on remand the equivalent of a seven and a half year prison sentence. We hope (as did Parker LJ in HC3, 91 Cr App R 427) that the question of return can now be determined without delay.

Also found at [1991] 2 CLJ 1067